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IN THE

Supreme Court of the United States

October Term, 1968

NO. 727

LLOYD BRAXTON BURGESS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Lloyd Braxton Burgess, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on October 11, 1968, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated October 11, 1968, has not been reported to date. The opinion appears in the Appendix hereto at page 1A.

JURISDICTION

The judgment of the Court of Appeals is dated October 11, 1968, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Can officers stop and search an automobile without knowledge of facts and circumstances sufficient to allow the seizing officers to have probable cause or reasonable grounds to believe that the vehicle was hauling contraband whiskey?

STATEMENT OF CASE

Jurisdiction of the District Court of the Middle District of North Carolina was invoked because petitioner was charged with violations of the Federal Internal Revenue Act.

The petitioner, Lloyd Braxton Burgess, along with his co-defendant, James Herman Lewis, was charged in a two count bill of indictment.

The first count of the bill of indictment charged that on or about December 7, 1967, the petitioner and his co-defendant unlawfully did remove certain distilled spirits, to wit, 6⅛ gallons of whiskey on which a tax had not been paid or determined as required by law, from the place of its manufacture or storage, or from an instrument of transportation and did unlawfully conceal said distilled spirits in violation of 26 USC 5601(a)(12).

The second count of the bill of indictment charged that on the same date the petitioner and his co-defendant did possess and transport certain distilled spirits to wit, 6⅛ gallons of whiskey, the immediate containers of which did not then and there have affixed thereto a stamp evidencing the determination of the tax or indicating compliance with the provisions of the Revenue Code of the United States relating to distilled spirits, in violation of 26 USC 5205(a)(2), 5604(a)(1). R.p. 7.

Prior to the arraignment the petitioner and his co-defendant duly filed a motion to suppress under Rule 41(e)

Rules of Criminal Procedure. The motion of the petitioner and his co-defendant to suppress prayed that 6⅛ gallons of whiskey and other material, commodity, equipment or vehicle seized on December 7, 1967, or any evidence pertaining to the same be suppressed as evidence against the petitioner, Lloyd Braxton Burgess and/or his co-defendant James Herman Lewis, for unlawful search and seizure in violation of the rights of the petitioner and his co-defendant under the Fourth Amendment to the Constitution of the United States for the following reasons:

1. That the aforesaid property was illegally seized without an arrest warrant.

2. That the aforesaid property was illegally seized without a search warrant.

3. That the aforesaid property was not seized as an incident to a lawful arrest.

4. That the 6⅛ gallons of whiskey seized in this action was illegally seized by officers from a 1956 Dodge Sedan operated by the defendant Lloyd Braxton Burgess on N. C. Highway 98, a public highway and the officers who seized the aforesaid whiskey did not have probable cause to believe that the aforesaid vehicle was being used, at the time of seizure, in violation of law. R.p. 8-9.

The warrant of arrest was issued as to both the petitioner and his co-defendant on December 8, 1967, one day after the search of the 1956 Dodge, driven by the petitioner on December 7, 1967, and was served on December 8, 1967, at 3:00 p.m. R.p. 5.

The record of the case discloses that no search warrant was issued, served and returned to the Clerk of the District Court, R.p. 1-18.

The government filed a response to the motion of the petitioner and his co-defendant to suppress dated March 7, 1968, in which the government requested that the motion to suppress of the petitioner and his co-defendant be denied. R.p. 10.

The petitioner and his co-defendant were arraigned on the 25th day of March, 1968, and entered a plea of not guilty, Tr.p. 1-5 and waived jury trial. Tr.p. 5-8. At the time of arraignment it was stipulated that the court could hear the evidence as it bears on the motion to suppress and on the guilt or innocence of the petitioner and his co-defendant at the same time. Tr. pp. 8-9.

At the arraignment the Assistant District Attorney stated to the court as follows:

> "If your Honor pleases, if the Motion is allowed, then the Government is not in Court; we have lost the case." Tr. p. 9.

This District Judge at the close of the evidence entered a judgment of acquittal of the defendant James Herman Lewis. Tr. p. 60.

The District Judge denied the petitioner Burgess' motion to suppress the evidence, Tr. p. 69, and also denied the petitioner Burgess' motion for judgment of acquittal. Tr. p. 70 and convicted the petitioner Burgess.

The court entered judgment that the petitioner Burgess be committed to the custody of the Attorney General or his authorized representative for a period of six months on the first count of the bill of indictment and on the second count of the bill of indictment imposition of the sentence was suspended and the petitioner placed on probation for a period of five years to commence at the expiration of the sentence

imposed in count one of the bill of indictment and subject to the conditions of probation set forth in the written minutes of the court to which reference was made for the conditions thereof. R.p. 12.

On April 1, 1968, the petitioner Lloyd Braxton Burgess duly entered notice of appeal from the aforesaid judgment entered against him and the sentence imposed to the Circuit Court of Appeals of the Fourth Circuit. R.p. 14.

The United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court, Appendix p. 1A.

RELEVANT FACTS

WITNESS R. C. COLLINS

The witness, R. C. Collins, testified that he is an ABC Officer with the Durham County ABC Department and was working in that capacity on December 7, 1967. Tr. pp. 12-13.

The witness, R. C. Collins, further testified that between 2:00 and 3:00 on the afternoon of December 7, 1967, he received information from a source from which he had received information in the past on two or three occasions and which had proved very reliable. Tr. pp. 13-14.

The witness Collins stated that his informant told him that the petitioner Burgess would leave his home about first dark and would be carrying non-taxpaid whiskey in a 1956 Blue Dodge, N. C. License No. EX 4307. Tr. p. 14.

The witness Collins further testified that he and an officer named Devaney set up an observation at about 5:30 p.m. about 200 yards or maybe a little more southwest of the Burgess house across the road. Tr. pp. 15-16. That officer Turner and other officers parked some distance from the residence of Mr. Burgess. Tr. p. 16.

The witness Collins further testified that he knew that the petitioner Burgess had been arrested for non-taxpaid whiskey before. Tr. p. 15.

The witness Collins further testified that about 6:00 that evening the petitioner Burgess and another person that he didn't know at that time came in Mr. Burgess' truck which was a 1965 Ford truck. They pulled the truck up in the back yard and petitioner Burgess and the other occupant got out and went in the house. They stayed in the house 10-15 minutes and came out and went to the truck. The other man got out a box or a carton out of the back of the truck

which was about 24 times 18. That whiskey is normally stored in half-gallon fruit jars and some plastic jugs in that area and that half-gallon fruit jars and some plastic jugs are contained in pasteboard cartons similar to what he observed. Tr. pp. 17, 18, 19.

The witness Collins further testified that the persons he saw went towards a 1956 Blue Dodge that was parked further down in the back of petitioner Burgess' premises and that in just a few minutes he heard what sounded like a trunk lid shutting and two doors shut and a motor crank and the car went out the north side with its lights on headed north on the Boyce Mill Road. Tr. pp. 19, 20. The witness Collins further testified that he radioed the other officers among whom was Charles Turner and told Turner that "they had put something on the car and were leaving." Tr. p. 20.

The witness R. C. Collins, on cross examination, when asked why he put in his statement that his information was that the petitioner Burgess was hauling non-taxpaid whiskey in a blue 1956 Dodge in the early evening hours when this information according to his testimony on direct testimony was that he was to haul non-taxpaid whiskey on December 7, 1967, stated it had the same meaning to him. Tr. pp. 21-22. That he was watching the house that evening because he wanted to make sure. Tr. p. 23. That he didn't know which way he would go to town. Tr. p. 23.

That he and the other officers were sitting right up on the bank of the road behind a little bush in the edge of the woods and that it was black dark by the time the petitioner Burgess arrived. Tr. p. 24.

The witness Collins further testified on cross examination that the petitioner Burgess had a Mercury light that comes on when darkness falls and that the only reason that he could see him was because of the mercury light. Tr. p. 24. That the witness Collins further testified that on cross examination

the 1956 Blue Dodge was behind a block house in the rear. Tr. pp. 24-25. That the persons he saw went to a shed two or three times and turned on a light in the shed. Tr. p. 26. That he could see the front end of the 1956 Blue Dodge but not the back of it. Tr. pp. 24-25.

The witness Collins further testified on cross examination that his informant did not tell him which way the petitioner Burgess would go to Durham. That the petitioner Burgess would not have come by the other officers at the place they were first stationed until Collins contacted them by radio and informed them the direction that Burgess left his house. Tr. pp. 27-28.

On cross examination the witness Collins further testified that the petitioner Burgess left his house by the north driveway that the light in the back was on the opposite side from where he was looking. Tr. p. 29. And the petitioner Burgess did not need any lights until he got to the highway. Tr. p. 29.

That all the witness Collins saw was Mr. Burgess and a man along with him with a box that looked like a fruit jar box go toward the house or shed and turn on the lights and then leave the house or shed and then he heard something like a trunk slam and then two sounds like doors and then the motor cranking. Tr. p. 29.

The witness Collins further testified on cross examination that he had had to bounce a trunk lid up and down more than one time to close it and that he did not hear too well. Tr. pp. 29-30.

WITNESS CHARLES TURNER

Charles Turner testified that he is an ABC Officer with the Durham County ABC Department and was working in that capacity on December 7, 1967. Tr. p. 33.

The witness Turner further testified that he was with the

witness Collins when he received the information. Tr. p. 33. That as a result of information he participated in surveillance and observation that was set up surrounding the residence of petitioner Burgess and that in that connection he was in an automobile equipped with two-way radio and was in contact with the witness Collins. Tr. p. 33.

That witness Turner further testified that the petitioner had a record and reputation for dealing in whiskey. Tr. pp. 35-36.

The witness Turner further testified that he was first stationed on Highway 98 about a mile from the Burgess home and later had to change his position. At about 6:30 p.m. that evening he received a radio communication from witness Collins who told him that the 1956 Dodge was leaving the residence of Burgess headed north on Boyce Mill Road. That the direction the 1956 Dodge took was in the other direction from where the officers were parked and that he had to change his position up on Highway 98 above the Baptist road. Tr. p. 35.

The witness Turner further testified that after he changed his position he saw the 1956 Dodge, License No. EX 4307 coming out of the Baptist Road into Highway 98 heading toward Durham which would be in a western direction and that he stopped the automobile and Burgess was driving and the defendant Lewis was in the car. Tr. pp. 37-38.

The witness Turner further testified that after the automobile was stopped, they searched the automobile and found 6 gallons of non-taxpaid whiskey in the trunk and one pint inside the automobile. Tr. pp. 37-38. That the whiskey was contained in half-gallon fruit jars. Tr. p. 38.

The witness Turner testified on cross examination that the first place the officers stopped to wait was up near the Boyce Mill Road and that Burgess would not have to come by him

at all at that position and that where Burgess did come by was several miles further west on Highway 98. Tr. pp. 39-40.

The witness Turner further testified on cross examination that when he saw the automobile, Burgess was driving at a reasonable rate of speed and that he didn't smell any liquor before he stopped him and that the reason he stopped him was because he got a radio message that "he had put something on the car." And that he received information from the witness Collins "that the car had left." Tr. p. 40.

Witness Turner further stated on cross examination that he didn't see any liquor until he stopped and searched the car. Tr. p. 40.

The evidence is not clear when any defendants were arrested. Tr. pp. 41-43.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Fourth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

Officers cannot stop and search an automobile without knowledge of facts and circumstances sufficient to allow the seizing officers to have probable cause or reasonable grounds to believe that the vehicle was hauling contraband whiskey.

The point involved in this petition is not only important to the petitioner but to all of the citizens of our nation. Our founding fathers at the beginning of our nation adopted the Fourth Amendment to our Constitution guaranteeing the right of people to be secure in their persons, houses, papers and other effects against unreasonable searches and seizures.

This decision allows officers, without a warrant either to search or arrest, to stop a motor vehicle proceeding upon the

public highway, without any apparent violation of law, and search the same without sufficient information within the knowledge of the seizing officers to base probable cause for a search. If this decision of the Circuit Court of Appeals is allowed to stand the protection of the Fourth Amendment to the Constitution of the United States will no longer be a vital and effective shield from over-zealous officers whether they be federal or state officers.

The decision of the Circuit Court of Appeals as applied to the facts of this case are particularly repugnant to the Fourth Amendment of the Constitution of the United States because probable cause or reasonable grounds for the search was not established within the knowledge of the seizing officers and in order to arrive at a finding of probable cause or reasonable grounds for search the seizing officers were allowed to use the knowledge of non-seizing officers, uncommunicated and unknown to the seizing officers.

The decisions of this Court in *Carroll v. United States,* 267 US 132, (1925), *Brinegar v. United States,* 338 US 160 (1939), *Husty v. United States*, 282 US 694 (1931) limit the facts and circumstances necessary to establish probable cause or reasonable grounds to believe that a vehicle is hauling contraband liquor, in a non-warrant case, to those facts and circumstances within the knowledge of the "seizing" officers. In all of these cases the information necessary to establish probable cause or reasonable grounds to believe that the vehicle was hauling contraband was in possession of the officer or officers actually making the search and seizure.

The case of *Carroll v. United States, supra,* which is the original authority permitting search of a motor vehicle without a warrant, specifically limits the search to the seizing officer wherein the court stated as follows:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon

> probable cause, that is, upon a belief, reasonably arising out of circumstances *known to the seizing officer*, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

The above quoted language of *Carroll v. United States* was quoted with approval by the United States Court of Appeals of the District of Columbia in *United States v. Ceforatti* (1952) 202 F 2d 13, at page 15 and by the Sixth Circuit Court of Appeals in *United States v. Baxter,* 361 F 2d 116 at 119 (1966) and by 47 American Jurisprudence, Search and Seizure, Section 18, which states the rule as follows:

> " . . . The measure of the legality of such a seizure is, therefore, THAT THE SEIZING OFFICER shall have reasonable or probable cause for belief that the automobile which he stops and seizes contains contraband goods which are being illegally transported."

The first time the searching and seizing officer Turner or any of those assisting him saw the petitioner Burgess he was driving at a reasonable rate of speed and the officers did not smell any liquor and did not see any liquor until they stopped and searched the car and officer Turner testified THE ONLY REASON THE PETITIONER BURGESS WAS STOPPED WAS BECAUSE OF THE RADIO MESSAGE FROM OFFICER COLLINS THAT HE HAD PUT SOMETHING IN THE CAR AND LEFT. Tr. p. 40.

The officers who participated in the stopping of the 1956 Dodge driven by the petitioner Burgess were Durham County ABC Officer Charles Turner, Leon Smith of the ABC office of Wake County and Joe Carter with the Alcohol and Tobacco Tax Division. Tr. pp. 15, 16, 38.

These officers were not stationed at the home of the

petitioner but were out on Highway 98 about a mile from petitioner's home and later moved to another position where the petitioner's automobile was stopped several miles from the petitioner's house. Tr. pp. 16, 33, 34, 40.

The only evidence Charles Turner, Leon Smith and Joe Carter, the seizing officers, had upon which to base probable cause prior to the stopping of the petitioner's automobile was a radio message from Officer Collins to Officer Turner that "they had put something on the car and were leaving." Tr. pp. 20, 40. And Officer Turner's knowledge that the petitioner had a record and reputation for dealing in whiskey. Tr. pp. 35-36.

There is no evidence that any of the seizing officers, Charles Turner, Leon Smith or Joe Carter, ever heard the information given by the informer to ABC Officer Collins who was not a seizing officer. Further there is no evidence that seizing officer, Charles Turner, or the other seizing officers, Carter or Smith, knew the informer or had any information as to his reliability. Tr. p. 33.

The evidence is positive and beyond caval that neither Officer Collins nor Officer Devaney, who were stationed about 200 yards southwest of the petitioner's house, did not inform the seizing officers, Turner, Smith or Carter, of the events that transpired at the petitioner's home prior to the departure of the automobile which the seizing officers later seized and searched. Tr. pp. 16, 20, 40.

The sum total of the information possessed by the seizing officers prior to the stopping of the 1956 Dodge and the search of the same is that one of the seizing officers, ABC Officer Charles Turner, saw the petitioner's 1956 Dodge in his yard early in the evening. Tr. p. 35. That one of the seizing Officers, Charles Turner, knew that the petitioner had a record and reputation for dealing in whiskey. Tr. pp. 35, 36. That Officer Collins, who was stationed outside of the pe-

titioner's home, radioed to the seizing officers, Turner, Smith and Carter, who were stationed a mile away from petitioner's home that "they had put something on the car and were leaving". Tr. pp. 20, 40.

There is evidence that seizing officer Charles Turner was present when an unknown informer gave information to non-seizing officer Collins. However, there is no evidence that seizing officer Turner even heard this information or was ever told the substance of the information by non-seizing officer Collins or that he had any knowledge whatsoever of the identity of the informer or his reliability. Tr. p. 33. There is no evidence that the other seizing officers, Smith and Carter, were even present when non-seizing officer Collins received the information from the informer. Tr. p. 33.

The trial judge conceded that the seizing officers did not have sufficient facts to support a finding of probable cause or reasonable grounds to support the search but upheld the search as "based upon the information furnished by a reliable informer and corroborated by related facts and circumstances within the personal knowledge of officers participating in investigation, there was probable cause to constitute a stopping and searching of the automobile being operated by the defendant Burgess." Tr. p. 69.

In the case of *Henry v. United States,* 361 US 98 (1959) this court well stated that probable cause or reasonable grounds for belief must be had by officers prior to the stopping and searching of the vehicle.

It is respectfully submitted that the seizing officers cannot use the information obtained by non-seizing officers, Collins and Devaney, from their observation of the petitioner's home over a mile from where the seizing officers were stationed, because this information was not communicated to the seizing officers prior to the stopping of the vehicle and its search. Neither can the Court consider as a basis for probable cause

or reasonable grounds for belief, information of an informer when this information was known only to non-seizing officer Collins and when none of the seizing officers had any knowledge whatsoever of the informer's information or the reliability of the informer. There is no evidence that the non-seizing officers Collins and Devaney ever divulged any of this information to the seizing officers except the innocuous statement "they had put something on the car and were leaving." Tr. pp. 20-40.

Certainly the mere fact that the petitioner has a criminal record did not amount to probable cause or reasonable grounds for the search and the only facts in addition to his criminal record within the knowledge of the seizing officers was the meaningless information "they had put something on the car and were leaving." Tr. pp. 20, 40.

The court by permitting the seizing officers to use the evidence within the knowledge of non-seizing officers stationed one mile away from the seizing officers, which evidence was not communicated to the seizing officers prior to the stopping and searching of the vehicle, has created a dangerous and unwarranted extension of the right of officers to stop and search a motor vehicle upon probable cause or reasonable grounds to believe that it is hauling contraband.

Counsel for the petitioner, after diligent search, has found no case in this court or any other court which has departed from the requirement that knowledge of facts sufficient to establish probable cause or reasonable grounds, sufficient to support a search and seizure, must be within the knowledge of the seizing officers at the time of the stopping and searching of the vehicle except this decision of the United States Court of Appeals for the Fourth Circuit which has decided a federal question in a way in conflict with applicable decisions of this court and a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 12,311.

UNITED STATES OF AMERICA,

Appellee,

versus

LLOYD BRAXTON BURGESS,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina. Edwin M. Stanley, District Judge.

Decided; October 11, 1968

Before Haynsworth, Chief Judge, and Bryan and Butzner, Circuit Judges.

PER CURIAM:

This is an appeal from a conviction for offenses under the Internal Revenue laws relating to whisky. We find no merit in the appeal and affirm the conviction.

Pursuant to information received from a confidential informer, revenue agents established a surveillance of the defendant's home. They observed the defendant and another remove from a pickup truck a cardboard container of the kind used in the transportation of illegal whisky in half-gallon containers. They listened as they heard sounds which they believed to be the closing of the trunk of an automobile, the closing of two of its doors and the starting of its engine, all but the front end of a blue 1956 Dodge being concealed from their view. Presently, and at the time indicated by the confidential information they had received, the defendant with his companion drove out of his yard in the blue 1956 Dodge and turned in the direction of Durham, North Carolina.

The Dodge was stopped; its occupants arrested, and the search of the trunk disclosed the carton containing half-gallon jars of illegal whisky, while one pint of the whisky was in the passenger compartment.

Clearly the officers had probable cause to believe an offense was being committed. They knew the defendant had been in the whisky business and their general observation of the loading of the cardboard carton, of the type with which they were familiar, furnished probable cause to believe that it contained whisky and that it was being transported in the Dodge automobile.

The existence of probable cause for the arrest and the incidental search was not dependent upon the previously established reliability of the confidential informant. If the information had come from an anonymous phone call and

merely occasioned the surveillance, it would have acquired reliability by the observations of the officers, and what they observed justified the arrest. Under the circumstances, the District Court quite properly refused the demand of the defense that the confidential informer be identified and his veracity and reliability tested under cross examination of the testifying officer.

Affirmed.